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No. 80-1608

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. In our opening brief we argued that the policies underlying the exclusionary rule compel the conclusion that a decision resolving a previously unsettled Fourth Amendment question should not be applied retroactively. Respondent acknowledges (Br. 2, 6-7, 10-11), as he must, that prior to *Payton* v. *New York*, 445 U.S. 573 (1980), and *United States* v. *Prescott*, 581 F. 2d 1343 (9th Cir. 1978), this Court and the Ninth Circuit had expressly reserved decision on the constitutionality of warrantless arrest entries. Nevertheless, respondent argues (Br. 6, 9) that those decisions announcing a warrant requirement for arrest entries should be given retroactive effect because they "merely applied familiar and longstanding constitutional principles and did not establish a new principle of law," and that "even the most unsophisticated law enforcement officer" should have been capable of predicting the results in those cases.

Respondent's argument is unfounded. To begin with, it is absurd to suggest that *Payton* and *Prescott* did not establish a new constitutional rule. Prior to those decisions, neither this Court nor the Ninth Circuit had held that police must obtain a warrant before entering a suspect's home in order to arrest him on probable cause. While reserving decision on the constitutionality of warrantless arrest entries, both this Court and the Ninth Circuit had, in numerous cases,[1] assumed the validity of the practice, which was approved by many common law authorities and was standard police practice in this country from its inception. The fact that the Fourth Amendment had long been construed as requiring a warrant to search for property inside private premises did not, as respondent suggests, settle the issue with respect to arrest entries. On the contrary, at the time of the entry into respondent's house many judges and commentators, who presumably were aware of the warrant requirement for searches for property inside houses, had concluded that warrants were not required for arrest entries.[2] Indeed, as we have observed in our opening brief (at 26-27), if the court of appeals judges who initially upheld the warrantless entry into respondent's house (see Pet. App. 26a-27a) did not believe, in December 1978, that the Fourth Amendment imposed a warrant requirement, law enforcement officers in

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[1]See, *e.g.*, *Sabbath* v. *United States*, 391 U.S. 585, 588 (1968); *Ker* v. *California*, 374 U.S. 23, 37-38 (1963) (plurality opinion); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948); *Jack* v. *United States*, 387 F. 2d 471, 473 (9th Cir. 1967), cert. denied, 392 U.S. 934 (1968).

[2]We note that respondent considerably overstates (Br. 13-14, 15-16) the number of federal and state appellate courts that had prohibited warrantless arrest entries as of May 5, 1977, the date of the entry in this case. See our opening brief at 21, nn.10 & 11.

the Ninth Circuit should not be charged with having known, in May 1977, that such a requirement was the law.[3]

Respondent also argues that dicta appearing in the decisions of this Court and the Ninth Circuit, and persistent avoidance of the issue, "clearly foreshadowed" the results in *Payton* and *Prescott* and should have signalled to law enforcement officers that the Fourth Amendment required warrants for arrest entries. But statements made in dicta are, by definition, "unnecessary to [a court's] decision, and cannot be considered binding authority." *Kastigar* v. *United States*, 406 U.S. 441, 454-455 (1972). See *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968). Law enforcement officers should not be compelled to adhere to superfluous language inserted into judicial decisions.[4]

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[3]It is noteworthy that respondent himself did not argue that the absence of a warrant invalidated the arrest entry until after the Ninth Circuit's decision in *Prescott*. See respondent's petition for rehearing, dated Dec. 30, 1978, at 11-12. Prior to *Prescott*, respondent had simply contended that the arrest was invalid because the agents lacked probable cause. See respondent's court of appeals brief, dated Apr. 3, 1978, at 10-18.

[4]Respondent erroneously contends (Br. 11 & n.5) that government counsel's apparent concession in *United States* v. *Calhoun*, 542 F. 2d 1094, 1102 (9th Cir. 1976), that a warrantless entry would be unlawful absent exigent circumstances, established that the government's institutional position at the time of the entry in this case was that an arrest warrant was constitutionally required in order to arrest a person in his home. It would indeed be extraordinary if the statement of a single Assistant United States Attorney in a particular case bound the government or "proved" the state of the law, and that is of course not the case. Cf. *Barrett* v. *United States*, 423 U.S. 212, 222 & n.6 (1976).

Furthermore, respondent's reliance (Br. 2, 13 n.8) on an oral statement from the bench by District Judge Ferguson in the course of denying a suppression motion in *United States* v. *Rombouts*, Cr. No. 76-1540-F (C.D. Cal.), is also misplaced. The statement was mere dictum and was not binding on the government, which had no means of obtaining review of the statement. In addition, even if Judge Ferguson had decided the arrest entry issue adversely to the government, the

Moreover, the fact that the arrest entry issue was not settled in other cases decided by this Court and the Ninth Circuit prior to *Payton* and *Prescott* did not provide notice to anyone, including law enforcement officers, that the issue eventually would be decided adversely to the government. The failure to resolve the issue earlier is attributable to the familiar principle that important constitutional questions should not be decided unnecessarily. See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 475-476 (1970); *Rosenberg* v. *Fleuti*, 374 U.S. 449, 451 (1963); *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

Respondent characterizes (Br. 1, 3-4) our argument as construing *United States* v. *Peltier*, 422 U.S. 531 (1975), to hold that it does not matter for retroactivity purposes whether a Fourth Amendment decision declares new law or merely applies settled constitutional principles to the facts of the particular case. This misconstrues both our argument

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decision of one district judge is not binding on other judges within the district, and thus government agents within the district would not have been required to adhere to that decision. Respondent's approach would place an impossible burden on law enforcement officers by requiring them to conform their conduct to every suggestion made by a district judge in favor of expanding Fourth Amendment protections.

By the same token, the fact that the agents in this case obtained an arrest warrant for co-defendant Dodd does not, as respondent urges (Br. 15 n.10, 19-20), indicate that the agents were aware that the Fourth Amendment *required* them to get a warrant before arresting respondent inside his house. Respondent's bare speculation concerning the agents' subjective beliefs regarding the applicable constitutional standard underscores the problems inherent in respondent's analysis of the retroactivity question. Law enforcement agencies might be discouraged from adopting policies more protective of Fourth Amendment rights than the courts have theretofore held are constitutionally required if an occasional violation of such a policy by the agency's officers would inevitably lead to suppression upon a subsequent judicial determination that the conduct reflected in the policy is mandated by the Constitution. See *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979).

and the issue in this case. If a decision is based upon "existing constitutional principles" (Resp. Br. 4), its retroactivity is a matter of no moment in subsequent cases turning upon those preexisting principles, since the same result would be reached on the basis of those principles. Conversely, if a decision declares new law by overruling a prior decision, even respondent would agree (see, *e.g.*, Resp. Br. 26-27) that it should not be applied retroactively. The real area of dispute is whether new (and therefore nonretroactive) Fourth Amendment decisions are only those that overrule prior decisions, or also include those that resolve a previously unsettled point.

Contrary to respondent's characterization, therefore, our retroactivity analysis does start from the premise that *Payton* and *Prescott* announced new constitutional principles. In our view, a new Fourth Amendment rule is not established—and law enforcement officers may not be charged with knowledge of any such rule—until either this Court or the court of appeals for the circuit in which the challenged search or seizure took place authoritatively holds that conduct of the type in question is unlawful.[5]

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[5]Respondent claims (Br. 18) that the Fifth Circuit, in *United States* v. *Congote*, 656 F. 2d 971, 974 n.3 (1981), applied the *Payton* rule to a warrantless arrest entry that antedated the decision in *Payton*. In the course of holding that the defendant did not have "standing" to challenge the validity of a pre-*Payton* warrantless arrest entry, the court in *Congote* observed in dictum that the rule announced in *Payton* was not a "new rule" because it had previously been adopted by most of the courts of appeals. We submit that the statement in *Congote* reflects the same erroneous approach as that of respondent to the retroactivity of decisions announcing new Fourth Amendment principles. The dictum in *Congote* ignored the fact that, prior to *Payton*, the Fifth Circuit had consistently upheld warrantless arrest entries. See, *e.g.*, *United States* v. *Williams*, 573 F. 2d 348, 350 (5th Cir. 1978); *United States* v. *Savage*, 564 F. 2d 728 (5th Cir. 1977); *United States* v. *Hofman*, 488 F. 2d 287 (5th Cir. 1974); *United States* v. *Wysocki*, 457 F. 2d 1155 (5th Cir.); cert. denied, 409 U.S. 859 (1972). Thus, whatever may have been the law

Here, it is undisputed that prior to the entry into respondent's home neither this Court nor the Ninth Circuit had held unconstitutional the particular class of conduct in question—*i.e.*, the longstanding police practice of making warrantless arrest entries. Although respondent asserts (Br. 9-10) that any doubts about the need for an arrest warrant should have been resolved in favor of a warrant, respondent's approach stands the basic teaching of *Peltier* on its head. Under *Peltier*, the evidence obtained as a result of the warrantless entry into respondent's house should not be suppressed because the arresting agents did not have knowledge, and may not properly be charged with knowledge, that their conduct was unconstitutional under the Fourth Amendment. There might be some marginal deterrent benefit in requiring suppression in those situations where the police fail to resolve any doubts in favor of more stringent protections than the courts have theretofore held the Fourth Amendment to require. However, the costs to society in diminished law enforcement effectiveness greatly outweigh any incremental deterrent effect that might be achieved by applying the exclusionary rule to suppress reliable evidence seized by police officers in the course of a search or seizure that is established to have been unlawful only by subsequent decisions.

2. Respondent argues (Br. 2-3, 22-23) that certain actions by the agents after their entry into respondent's home militate in favor of retroactive application of *Payton* and *Prescott*.[6] But those decisions held only that the Fourth

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in the other circuits prior to *Payton*, law enforcement agents in the Fifth Circuit were justified in relying on the consistent line of decisions by that court of appeals upholding warrantless arrest entries. See *United States* v. *Peltier*, *supra*.

[6]The court of appeals did not pass upon the validity of the agents' actions in conducting a cursory search of respondent's home and in requesting respondent's wife to come into the living room. We note,

Amendment requires officers to obtain a warrant before effecting an arrest entry. The conduct of the agents inside respondent's home is therefore irrelevant to the retroactivity question before the Court. Furthermore, respondent's statements were the fruits, not of any arguably improper actions by the agents after their entry, but of respondent's arrest, which clearly was lawful because the agents had probable cause to believe that respondent had committed a crime. Thus, whether or not the agents' post-entry conduct was reasonable under the Fourth Amendment, that conduct may not serve as the basis for suppressing respondent's statements. See our opening brief at 13 n.6.

3. There is no merit to respondent's contention that he is entitled to benefit from the rule announced in *Payton* and *Prescott* because his case was pending on direct review when those cases were decided. In *Desist* v. *United States*, 394 U.S. 244, 253 (1969), the Court rejected the argument that a new Fourth Amendment decision should be applied retroactively to cases pending on direct review, noting that "[b]oth the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date." See *Williams* v. *United States*, 401

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however, that the courts of appeals have recognized that when officers arrest a person inside a residence they may conduct a brief inspection of the premises when they reasonably believe that other persons might be present who could pose a danger to them. See, *e.g.*, *United States* v. *Gardner*, 627 F. 2d 906, 909-910 (9th Cir. 1980); *United States* v. *Dien*, 609 F. 2d 1038, 1047 (2d Cir. 1979), adhered to on rehearing, 615 F. 2d 10 (1980); *United States* v. *Cravero*, 545 F. 2d 406, 417-418 (5th Cir. 1976), cert. denied, 429 U.S. 1100 (1977); *United States* v. *Rich*, 518 F. 2d 980, 985-986 (8th Cir. 1975). Similarly, it is a reasonable security precaution for officers arresting an individual inside a residence to exercise control over other persons present. Cf. *Michigan* v. *Summers*, No. 79-1794 (June 22, 1981), slip op. 10-11 & n.17.

U.S. 646, 656-659 (1971) (plurality opinion).[7] Thus, as we have shown in our opening brief (at 34-37), because the exclusion of reliable evidence undermines the factfinding objective of the criminal trial and because the deterrent purpose of the exclusionary rule is not served by retroactive application, there is no valid reason to apply new Fourth Amendment decisions retroactively to cases pending on direct review. All that is accomplished thereby is the freeing of a criminal.

For the foregoing reasons and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

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[7]Respondent cites (Br. 25 n.21) *Ker* v. *California*, *supra*, *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), and *Stoner* v. *California*, 376 U.S. 483 (1964), as general authority for the retroactive application of a new Fourth Amendment rule to cases pending on direct review. But as the Court pointed out in *United States* v. *Peltier*, *supra*, 422 U.S. at 535 n.5, "[t]hose cases were decided without discussion of retroactivity principles, and they have not been interpreted as establishing any retroactivity limitation of general applicability."